Manjit Kaur a/p Pertap Singh (suing through her son and litigation representative Amrit Pal Singh a/l Jaginder Singh) v Dr Nagasparan Natchappan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(NCVC)(W)-2386–12 OF 2021
HASHIM HAMZAH, MOHAMED ZAINI AND WONG KIAN KHEONG JJCA
3 NOVEMBER 2023

Tort — Negligence — Medical negligence — Appellant claimed her condition in suffering brain damage after visiting respondent was due to anaphylactic shock caused by respondent's negligence — High Court dismissed appellant's claim — Whether respondent was negligent in not properly attending to appellant — Whether respondent failed to comply with statutory requirements under Private Healthcare Facilities and Services Act 1998 and Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006, namely failing to have essential life-saving equipment, facilities and drugs and failing to attend to appellant

On 11 December 2018, the appellant went to the respondent's dental clinic to address a toothache and one of her molars needed to be extracted. The respondent had firstly injected Lignocaine into the appellant's gums to anaesthetise it. She was then given some tablets of Amoxicillin, Flagyl and paracetamol to consume before the extraction. She struggled to breath soon after and the respondent then performed the Heimlich manoeuvre on the appellant. That seemed to have relieved the appellant. The respondent nevertheless proceeded to call for an ambulance. The appellant and her daughter then made their way downstairs out of the clinic while the respondent was on the phone calling for an ambulance. The respondent had called the hospital for an ambulance but was told that none was available. The appellant and her daughter then went to the hospital while the respondent went in his car. The appellant suffered a cardiac arrest upon arrival at the hospital's emergency department. She was successfully resuscitated but suffered Hypoxic Ischemic Encephalopathy, a type of brain damage. She had since remained bedridden and dependent on others for sustenance. It was alleged that the appellant's condition was due to an anaphylactic shock caused by the respondent's negligence. At the High Court, the allegations of negligence against the respondent were: (a) failing to diagnose the appellant to ascertain whether she was allergic to penicillin-based medicines Lignocaine and Amoxicillin; and (b) failing to have the necessary equipment to stabilise the appellant's condition or to resuscitate her and to arrange and supervise her

transfer to the hospital properly. The High Court judge ('HCJ') held that the injury suffered by the appellant was not due to the medications that the respondent gave. The HCJ also accepted the respondent's version that the appellant's daughter had led her out of the clinic whilst he was calling for an ambulance and that he had no opportunity to attend to the appellant. Thus, the HCJ held that the appellant's well-being was no longer in the respondent's control as the appellant's daughter had decided to take her own course of action. Lastly, the HCJ ruled that the respondent had done the necessary by calling for an ambulance and that there was no need for him to perform cardiopulmonary resuscitation as the appellant was not unconscious when she was in the clinic or on the ground floor before she was taken to the hospital. The High Court dismissed the appellant's claim and hence, this appeal.

Held, dismissing the appeal:

(1) **(per Mohamed Zaini JCA, majority)** The HCJ's findings were correct, as it had been factually established that the appellant was not allergic to any of the medications administered or consumed. The HCJ had considered the testimonies of the appellant's daughter, the respondent and the latter's staff and had set out the reasons for his preference. His conclusion was rational based on the evidence presented and not repugnant to common sense. Additionally, the appellant did not put her case to the respondent. Her pleaded allegations remained unsubstantiated. Failing to challenge the version put by respondent and his staff meant that the appellant had abandoned that part of her pleaded case (see paras 19, 23 & 25–26).

(2) **(per Mohamed Zaini JCA, majority)** The HCJ concluded that the need to perform CPR did not arise as the appellant did not collapse or lose consciousness when she was in the clinic. There was no fault with the HCJ's finding that there was no causal link as he had judicially appreciated the evidence, namely that the appellant was not unconscious when she was in the clinic, which would require the respondent to give emergency aid under the statutory requirements (see paras 29–30).

(3) **(per Wong Kian Kheong JCA, dissenting)** The respondent's duty of care to the appellant included the duties under s 38(1) of the Private Healthcare Facilities and Services Act 1998, reg 75(1) of the Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 ('the PHFSR') and paras 2(a)–(d) of the Fifth Schedule to PHFSR ('the three duties'). The respondent's breaches of the three duties were a material contributing cause of the appellant's present vegetative state. This was because if the respondent had complied with the three duties, when the medical emergency first arose in the clinic, the respondent could have treated the appellant in the clinic itself without the need for: (a) the respondent to call for an

ambulance; (b) the respondent to seek medical assistance from the medical clinic; and (c) the appellant to be sent to the hospital. The tragedy that befell the appellant could have been easily avoided by the respondent's implementation of the three duties (see paras 52 & 55).

(4) **(per Wong Kian Kheong JCA, dissenting)** The HCJ did not consider at all the respondent's record of the appellant which should be given great weight because it was the respondent's own contemporaneous record of what had happened on 11 December 2018. The fact that the respondent himself did not record in the respondent's record that he had advised the appellant's daughter to stay in the clinic while waiting for an ambulance, could only mean that the respondent had failed to advise her as such (see para 59).

(5) **(per Wong Kian Kheong JCA, dissenting)** The court was not bound to accept the respondent's version merely because of the appellant's omission to put to the respondent's cross-examination that his evidence was contrary to the contents of the respondent's record. The HCJ should not have accepted the testimonies of the respondent and the respondent's assistant at the clinic and rejected the testimony of the appellant's daughter. If the appellant had put the contents of the respondent's record to the respondent during his cross-examination, it could not be envisaged or foreseen any reasonable explanation by him which could support his credibility in any manner. There was no injustice to the respondent due to the appellant's omission nor had the respondent been deprived of a fair trial by reason of the appellants omission. Therefore, the appeal should be allowed with costs (see paras 64–65 & 69).

[Bahasa Malaysia summary

Pada 11 Disember 2018, perayu pergi ke klinik pergigian responden untuk menangani sakit gigi dan salah satu gigi gerahamnya perlu dicabut. Responden telah mula-mula menyuntik Lignocaine ke dalam gusi perayu untuk membiusnya. Dia kemudian diberi beberapa tablet Amoxicillin, Flagyl dan parasetamol untuk dimakan sebelum cabutan. Dia mengalami kesukaran untuk bernafas tidak lama kemudian dan responden kemudian melakukan Heimlich *manoeuvre* ke atas perayu. Ia kelihatan telah melegakan perayu. Responden bagaimanapun terus menghubungi ambulans. Perayu dan anak perempuannya kemudian turun ke tingkat bawah dari klinik semasa responden sedang menelefon untuk menghubungi ambulans. Responden telah menghubungi hospital untuk mendapatkan ambulans tetapi diberitahu bahawa tiada yang tersedia. Perayu dan anak perempuannya kemudian pergi ke hospital manakala responden menaiki keretanya. Perayu mengalami serangan jantung sebaik tiba di jabatan kecemasan hospital. Dia berjaya diselamatkan tetapi mengalami Hypoxic Ischemic Encephalopathy, sejenis kecacatan otak. Sejak itu, dia terus terlantar sakit dan bergantung kepada orang lain untuk meneruskan kehidupan. Adalah didakwa bahawa keadaan perayu adalah

A disebabkan oleh kejutan anafilaksis yang disebabkan oleh kecuaian responden. Di Mahkamah Tinggi, dakwaan kecuaian terhadap responden adalah: (a) gagal mendiagnosis perayu untuk memastikan sama ada dia alah kepada ubat berasaskan penisilin Lignocaine dan Amoxicillin; dan (b) gagal memiliki peralatan yang diperlukan untuk menstabilkan keadaan perayu atau B menyedarkannya semula dan mengatur serta menyelia pemindahannya ke hospital dengan betul. Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa kecederaan yang dialami oleh perayu bukan disebabkan oleh ubat-ubatan yang diberikan oleh responden. HMT juga menerima versi responden bahawa anak perempuan perayu telah membawanya keluar dari C klinik semasa dia memanggil ambulans dan bahawa dia tidak mempunyai peluang untuk merawat perayu. Oleh itu, HMT memutuskan bahawa kesejahteraan perayu tidak lagi dalam kawalan responden kerana anak perempuan perayu telah memutuskan untuk mengambil tindakan sendiri. Akhir sekali, HMT memutuskan bahawa responden telah melakukan perkara D yang perlu dengan memanggil ambulans dan tidak ada keperluan baginya untuk melakukan resusitasi kardiopulmonari kerana perayu bukan tidak sedarkan diri semasa berada di klinik atau di tingkat bawah sebelum dia dibawa ke hospital. Mahkamah Tinggi menolak tuntutan perayu dan oleh itu, rayuan E ini.

Diputuskan, menolak rayuan:

(1) **(oleh Mohamed Zaini HMR, majoriti)** Penemuan HMT adalah betul, kerana ia telah terbukti secara fakta bahawa perayu tidak alah kepada F mana-mana ubat yang diberikan atau dimakan. HMT telah mempertimbangkan keterangan anak perempuan perayu, responden dan kakitangannya dan telah menyatakan sebab keutamaannya. Kesimpulannya adalah rasional berdasarkan bukti yang dikemukakan dan tidak bertentangan dengan akal. Selain itu, perayu tidak G mengemukakan kesnya kepada responden. Dakwaannya yang diplid kekal tidak berasas. Gagal mencabar versi yang dikemukakan oleh responden dan kakitangannya bermakna perayu telah meninggalkan bahagian kes yang diplid itu (lihat perenggan 19, 23 & 25–26).

H (2) **(oleh Mohamed Zaini HMR, majoriti)** HMT membuat kesimpulan bahawa keperluan untuk melakukan CPR tidak timbul kerana perayu tidak rebah atau tidak sedarkan diri ketika berada di klinik. Tidak ada kesalahan dengan penemuan HMT bahawa tiada kaitan sebab akibat kerana beliau telah menghargai keterangan secara kehakiman, iaitu I perayu bukan tidak sedarkan diri semasa berada di klinik, yang memerlukan responden memberi bantuan kecemasan di bawah keperluan berkanun (lihat perenggan 29–30).

(3) **(oleh Wong Kian Kheong HMR, menentang)** Kewajipan berjaga-jaga responden terhadap perayu termasuk kewajipan di bawah s 38(1) Akta

Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998, peraturan 75(1) Peraturan-Peraturan Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta (Klinik Perubatan Swasta atau Klinik Pergigian Swasta) 2006 ('PHFSR') dan perenggan 2(a)–(d) Jadual Kelima PHFSR ('tiga kewajipan'). Pelanggaran ketiga-tiga kewajipan responden adalah sebab penyumbang material kepada keadaan vegetatif perayu sekarang. Ini kerana sekiranya responden telah mematuhi ketiga-tiga kewajipan tersebut, apabila kecemasan perubatan mula timbul di klinik, responden boleh merawat perayu di klinik itu sendiri tanpa perlu: (a) responden memanggil ambulans; (b) responden untuk mendapatkan bantuan perubatan daripada klinik perubatan; dan (c) perayu untuk dihantar ke hospital. Tragedi yang menimpa perayu boleh dielakkan dengan mudah oleh responden melaksanakan ketiga-tiga kewajipan tersebut (lihat perenggan 52 & 55).

(4) **(oleh Wong Kian Kheong HMR, menentang)** HMT tidak mengambil kira sama sekali rekod responden mengenai perayu yang patut diberi berat kerana ia adalah rekod kontemporari responden sendiri tentang apa yang berlaku pada 11 Disember 2018. Hakikat bahawa responden sendiri tidak merekodkan dalam rekod responden bahawa dia telah menasihati anak perempuan perayu untuk tinggal di klinik sementara menunggu ambulans, hanya boleh bermakna bahawa responden telah gagal menasihatinya sedemikian (lihat perenggan 59).

(5) **(oleh Wong Kian Kheong HMR, menentang)** Mahkamah tidak terikat untuk menerima versi responden semata-mata kerana peninggalan perayu untuk mengemukakan kepada pemeriksaan balas responden bahawa keterangannya bertentangan dengan kandungan rekod responden. HMT sepatutnya tidak menerima keterangan responden dan pembantu responden di klinik dan menolak keterangan anak perempuan perayu. Jika perayu telah mengemukakan kandungan rekod responden kepada responden semasa pemeriksaan balasnya, ia tidak dapat dibayangkan atau diramalkan apa-apa penjelasan munasabah olehnya yang boleh menyokong kredibilitinya dalam apa jua cara. Tiada ketidakadilan berlaku kepada responden disebabkan oleh peninggalan perayu atau responden telah dilucutkan daripada perbicaraan yang adil oleh sebab peninggalan perayu. Oleh itu, rayuan hendaklah dibenarkan dengan kos (lihat perenggan 64–65 & 69).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Azman bin Karim & Anor v Hasa Arkitek Sdn Bhd & Ors [2023] MLJU 2190, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air

Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)
Clarke v Edinburgh and District Tramways Co 1919 SC (HL) 35, HL (refd)
Ling Hock Ling v Tai Lian Development Co [2006] 6 MLJ 712; [2006] 4 CLJ 396, CA (refd)
Liza bte Ismail v PP [1997] 2 SLR 454, HC (refd)
Chen v Ng (British Virgin Islands) [2017] UKPC 27, PC (refd)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184, FC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Architects Rules 1996 rr 28(1), 29(1)(b)
Evidence Act 1950 ss 6, 5, 55, 165, Chapter X
Private Healthcare Facilities And Services (Private Hospitals and other Private Healthcare Facilities) Regulations 2006 regs 75(1), (3), (5), (8), (9), Fifth Schedule, sub-paras 2(a), (b), (d)
Private Healthcare Facilities and Services Act 1998 ss 2, 38, 38(1), (2), 107, 107(1), (2)(j)

Appeal from: Civil Suit No NA-22NCVC-99–12 of 2019 (High Court, Seremban)

Bastian Pius Vendargon (with Manmohan S Dhillon and Desmond Mun) (PS Ranjan & Co) for the appellant.
GK Ganesan (with Murali GB Pillai, KN Geetha, Norhayati Zainudin, Amira Naziha Zainal, T Pavaani and J Lheela) (Murali B Pillai & Assoc) for the respondent.

Mohamed Zaini JCA (delivering majority judgment of the court):

INTRODUCTION

[1] We gave our decision earlier, where we had, by majority, dismissed the appeal with costs. My learned brother, Hashim bin Hamzah JCA, has read this judgment in draft and agreed to it.

[2] The appellant, then 78 years old, suffered brain damage after she visited the dentist, namely the respondent. She has since remained bedridden and

dependent on others for sustenance. It was alleged that the appellant's condition was due to an anaphylactic shock caused by the respondent's negligence. The High Court dismissed the appellant's claim after a full trial, hence this appeal.

FACTS

[3] The appellant went to the respondent's dental clinic to address a toothache. This clinic was situated on the first floor. It was agreed that one of her molars needed to be extracted. The respondent had firstly injected Lignocaine into the appellant's gums to anaesthetize it. She was then given some tablets of Amoxicillin, Flagyl and paracetamol to consume before the extraction. She struggled to breath soon after. The respondent then performed the Heimlich manoeuvre on the appellant. That seemed to have relieved the appellant. The respondent nevertheless proceeded to call for an ambulance. The appellant and her daughter then made their way downstairs out of the clinic while the respondent was on the phone calling for an ambulance. The respondent had called the hospital for an ambulance but was told that none was available. The appellant and her daughter then went to the hospital, ferried by a good samaritan. The respondent went in his car.

[4] The appellant suffered a cardiac arrest upon arrival at the hospital's emergency department. She was successfully resuscitated but suffered what is known medically as Hypoxic-Ischemic Encephalopathy, a type of brain damage. The attending physician noted in his records that the appellant had suffered a post-cardiac arrest secondary to an anaphylactic shock. Her airways were not blocked when she was intubated.

THE HIGH COURT'S FINDINGS

[5] The High Court summarised the allegations of negligence against the respondent as follows:

(a) failing to diagnose the appellant to ascertain whether she was allergic to penicillin-based medicines, which in this case was Lignocaine and Amoxicillin; and

(b) failing to have the necessary equipment to stabilise the appellant's condition or to resuscitate her and to arrange and supervise her transfer to the hospital properly.

[6] It was not disputed that the respondent, as a dentist, owed a duty of care to the appellant as his patient. On the first issue, the learned High Court judge held that the injury suffered by the appellant was not due to the medications that the respondent gave. The learned judge's findings were based on several

A factors. Of the medications given to the appellant, only two could have caused an anaphylactic shock: Lignocaine and Amoxicillin.

B [7] Lignocaine, which is used as a local anaesthetic, was ruled out as the appellant had previously been administered it by the respondent when she went for a tooth extraction in 2013. She did not suffer any adverse reaction then. Lignocaine was also applied to the Ryles tube used on the appellant when she was hospitalised without any adverse reactions.

C **[8]** Amoxicillin was also ruled out. The learned judge came to this finding as it would require at least thirty minutes for the body to absorb Amoxicillin after ingestion before it can take effect. The appellant had suffered breathing difficulties about one to four minutes after she had taken it.

D **[9]** The second issue took up much of the learned judge's deliberation. It was contended that the respondent was inept after the appellant had suffered breathing difficulties, as he:

(a) had failed to ascertain the cause of her breathing difficulties;

E (b) did not take charge of the situation, leaving the appellant and her daughter in a lurch;

(c) did not call 911 for an ambulance and had instead called the hospital directly; and

F (d) did not have in place a proper system to deal with emergencies.

It was also argued that the respondent should have checked the appellant's vitals after he had performed the Heimlich manoeuvre.

G **[10]** The pivotal issue at the trial and this appeal is whether the appellant had walked out from the clinic without the respondent's knowledge or consent, or whether she had done so at the respondent's behest. It was submitted that the appellant's condition would not have deteriorated had the respondent made her stay and waited for the ambulance.

H

[11] The appellant contended that the learned trial judge erred in preferring the respondent's version that the appellant and her daughter had, on their own volition, left the clinic despite his advice to wait for an ambulance. It was also submitted that the finding was contrary to what the respondent had I contemporaneously written in his dental records. The learned judge was satisfied that the respondent had firstly enquired with the appellant whether she felt better, which she answered in the affirmative, and that he had reasonably taken steps to call for an ambulance as he did not discount the possibility that she might be suffering from other medical problems even

though her airway was not inhibited by any foreign objects. It was also contended that the respondent had failed to advise the appellant to remain at the clinic and attend to her.

[12] The learned judge accepted the respondent's version that the appellant's daughter had led her out of the clinic whilst he was calling for an ambulance and that he had no opportunity to attend to the appellant. The learned judge held that the respondent's well-being was no longer in the appellant's control as the appellant's daughter had decided to take her own course of action. The learned judge also did not fault the respondent for not being in the same car with the appellant when she was brought to the hospital by the good samaritan, as the hospital was merely five minutes away and that the good samaritan had driven at high speed without stopping at the traffic lights.

[13] As for the respondent's failure to call 911 and instead calling the hospital directly, the learned judge held that this was moot, as the appellant had chosen to leave the clinic, and that in any event, it made perfect sense to call the hospital directly given that the hospital was only five minutes away and that there would not have been any need to route the emergency call by calling 911.

[14] The final issue was whether the respondent had failed to make available life-saving equipment and a well-defined care system to provide emergency care services under s 38 of the Private Healthcare Facilities and Services Act 1998 ('the Act') and its 2006 Regulations ('the Regulations'), namely regs 75(1), (3), (5) and Schedule 5, and failing to treat the appellant at the clinic.

[15] Section 38 of the Act reads as follows:

> Section 38 Emergency Treatment And Services
>
> (1) *Every licensed and registered private healthcare facility or service shall at all times be capable of instituting, and making available, essential life saving measures and implementing emergency procedures on any person requiring such treatment or services.*
>
> (2) *The nature and scope of such emergency measures, procedures and services shall be prescribed.*

[16] Regulations 75(1), (3), (5) and Schedule 5 of the Regulations are as follows:

> 75 Basic Emergency Care Services
>
> (1) All private medical clinics or private dental clinics shall have a well-defined care system for providing basic outpatient emergency care services to any

A occasional emergency patient who comes or is brought to the private medical clinics or private dental clinics by chance.

(2) The nature and scope of such emergency care services shall be in accordance with a private medical clinic's or private dental clinic's.

B (3) All private medical clinics or private dental clinics shall provide immediate emergency care services which include life-saving procedures when life, organ or limb is in jeopardy and management of emergency psychiatric conditions.

(4) ...

C (5) Policies and procedures governing the acceptance and care of emergency patients shall be established.

Fifth Schedule

D Basic Emergency Services, Equipment, Apparatus, Materials And Pharmaceuticals

1. Private Medical Clinic

Each private medical clinic shall unless otherwise specified by standards set for that private medical clinic, provide at a minimum the following services and equipment, E both adult and paediatric, to provide emergency care:

(a) an emergency call system;

(b) oxygen;

F (c) ventilation assistance equipment, including airways and manual breathing bag;

(d) intravenous therapy supplies necessary for the level of services to stabilize the patient as specified by the person in charge;

(e) electrocardiogram;

G (f) laryngoscope and endotracheal tubes, if possible;

(g) suction equipment;

(h) in dwelling urinary catheters; and

H (i) drugs and other emergency medical equipment and supplies, necessary for the level of services to stabilize the patient as specified by the person in charge.

2. Private Dental Clinic

I Each private dental clinic shall unless otherwise specified by standards set for that private dental clinic, provide at a minimum the following services and equipment, both adult and paediatric, to provide emergency care:

(a) an emergency call system;

(b) ventilation assistance equipment;

(c) suction equipment; and

(d) drugs and other emergency medical equipment and supplies, necessary for the level of services to stabilize the patient as specified by the person in charge.

[17] The learned judge relied on the minutes tendered by the respondent of a meeting between the Malaysian Private Dental Practitioner's Association and the Principal Director of Dental Services of the Ministry of Health in March 2021. The minutes show that it was decided that emergency drugs and oxygen tanks would only be required if a dental clinic performs a procedure that requires sedation and that only an AMBU bag is otherwise necessary. The appellant argued that the learned judge erred in relying on the minutes as they should not be used to interpret statutory regulations that had been in place since May 2006. The learned judge also ruled that the respondent had done the necessary by calling for an ambulance and that there was no need for him to perform cardiopulmonary resuscitation as the appellant was not unconscious when she was in the clinic or on the ground floor before she was taken to the hospital.

FINDINGS

[18] To make a case for negligence, it is vital to prove that the respondent's negligence caused the injury and that there must be a link between the injury and the negligent act. There may, however, be more than one negligent act leading to the injury. The Supreme Court in *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1 held that there must be a link between the wrongdoing and the damage caused and that the burden lies on the plaintiff to prove it. The apex court expounded that where two or more factors could contribute to the damage, the crucial issue is whether any of these factors had materially contributed to the plaintiff's injury. The court also held that what is a material contribution is a question of degree for the court to decide.

[19] The issue of whether the medication given to the appellant was the cause of the appellant's misfortune was not canvassed at this appeal. We are nevertheless of the view that the learned judge's findings were correct, as it had been factually established that the appellant was not allergic to any of the medications administered or consumed.

[20] The appellant's learned counsel's main focus in this appeal is what transpired after the respondent had done the Heimlich manoeuvre on the appellant. It was forcefully argued that the respondent was negligent in not properly attending to the appellant. Not only had he failed to ascertain the cause of her breathing difficulties, but he also did not take charge of the

A situation, leaving the appellant and her daughter in a lurch. It was also contended that had the respondent called 911 instead of calling the hospital directly, the ambulance would have arrived much sooner.

B **[21]** The thrust of the appellant's case lies with the respondent's dental records, which the latter had recorded on the day of the incident upon returning from the hospital. It is necessary to reproduce the relevant contents of the dental records as they are germane to this issue:

> C ... After taking the medication patient suddenly has difficulty in breathing. Then gave first aid. She was able to walk and sit on the chair. Then we call the ambulance but the response was late. So we decided to take the patient to GH by car. Patient was able to walk half way down the stairs. Then she nearly collapsed. We manage to carry the patient down and took her to the GH. She was immediately attended to by the doctors and CPR was given. They were able to get her heartbeat back. Then I came to clinic.

D

[22] The appellant's learned counsel submitted that the respondent's notes contradicted the respondent's testimony that the appellant and her daughter had, on their own volition, chosen to leave the clinic when he was calling for an E ambulance. The respondent's notes were consistent with the respondent's daughter's testimony that the respondent did not advise them to stay and wait for the ambulance. It was submitted that the learned trial judge had erroneously preferred the oral testimonies of the respondent and his staff when he should have given more weight to the appellant's daughter's testimony, F which was consistent with the contents of the respondent's contemporaneous records.

[23] We are, with respect, not persuaded. The learned trial judge had considered the testimonies of the appellant's daughter, the respondent and the G latter's staff and had set out the reasons for his preference. We opine that his conclusion was rational based on the evidence presented and not repugnant to common sense. This was the approach set out by the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC) when H assessing a trial court's findings.

[24] The respondent's version was never challenged based on the contents of his dental records. The relevant parts of his cross-examination are as follows:

I

> SC: Now, for this last entry for 11.12.2018, when did you write these notes?
>
> SD1: This one I wrote after I came back from the hospital.
>
> SC: Doctor, this is the Dental Report that you prepared. Now, this is your notes on the day and these are the notes in the medical report. There is more information here than in the medical report. Could you explain why that's the case?

SD1: Because I wrote on in brief, when I came back and wrote it in brief. But when I'm writing the report, I wrote about whatever happened and asked my staff because they were in the surgery with me, so whatever I missed out I asked them and then only I wrote everything in detail.

[25] It was never put to the respondent that his notes contradicted his testimony, nor was it suggested that his notes accurately represented what happened. The respondent's staff also testified that the appellant and her daughter had left of their own volition despite her telling them not to leave. Her testimony, too, was not challenged during cross-examination. In gist, the appellant did not put her case to the respondent. Her pleaded allegations remain unsubstantiated.

[26] We would also add that failing to challenge the version put by respondent and his staff meant that the appellant had abandoned that part of her pleaded case. A party's case must be expressly put to the opponent's witnesses under cross-examination as a failure to do so would mean that he has taken to accept his opponent's version and would also bar him from raising it in argument: see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 (CA), and the House of Lord's decision in *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35.

[27] On the contrary, the apparent contradiction lies in the appellant's daughter's testimony. The appellant's daughter had, in her witness statement, stated that she and the respondent had carried the appellant out of the clinic and down the stairs. Her testimony under cross-examination was quite different. The relevant parts of her testimony are as follows:

SC: So you then helped your mother out the clinic and down the stairs?

SP2: Yes.

SC: So you were holding her arm?

SP2: Yes

SC: And she started to walk down the stairs herself?

SP2: No.

SC: So how did you go down the stairs?

SP2: There was another man from the clinic who helped as well. So we held her under her arms and lifted her out.

[28] The learned trial judge, in his judgment, reasonably held that although he did not believe the appellant's daughter to be intentionally untruthful in her testimony, he found that she must not have been entirely focused and was in a

state of high alarm at that time. We are therefore resolute that the learned trial judge's findings were not plainly wrong and were indeed well supported by the evidence presented. We are hesitant to interfere with the learned judge's findings of facts based on the credibility of the witnesses, as the assessment of the witnesses is well within his purview as the trial judge: *Ling Hock Ling v Tai Lian Development Co* [2006] 6 MLJ 712; [2006] 4 CLJ 396 (CA).

[29] We will now address the issue of whether the respondent had failed to comply with some of the statutory requirements under the Act and its Regulations, namely failing to have essential life-saving equipment, facilities and drugs and failing to attend to the appellant. The learned trial judge, in his judgment, did not address this issue at length and seemed to opine that the respondent did not breach the relevant statutory provisions. Nevertheless, the learned trial judge concluded that the need to perform CPR did not arise as the appellant did not collapse or lose consciousness when she was in the clinic. Even if the respondent had breached the relevant statutory requirements, the breaches did not cause the misfortune that fell on the appellant.

[30] We find no fault with the learned judge's finding that there was no causal link as he had judicially appreciated the evidence, namely that the appellant was not unconscious when she was in the clinic, which would require the respondent to give emergency aid under the statutory requirements. If at all, her condition was made worse when she walked down the stairs, which, as we found earlier, was a decision made by her and her daughter.

CONCLUSION

[31] The factual findings of the trial court should not be disturbed where the conclusions were, to a large extent, based on the credibility of the witnesses and the impression formed by the trial judge who has seen them and judged their honesty and accuracy: *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163. We are also satisfied that the factual findings of the learned trial judge were not plainly wrong and that there are no errors that warrant an appellate intervention. The appeal is therefore dismissed with costs of RM20,000 to the respondent subject to allocatur.

Wong Kian Kheong JCA (delivering dissenting judgment of the court):

A. INTRODUCTION

[32] For ease of reference, I shall refer to parties as they were in the High Court ('HC').

[33] On 3 October 2023, my learned brothers, Hashim bin Hamzah and Mohamed Zaini Mazlan JJCA, had dismissed this appeal with costs ('majority decision'). I have had the misfortune to dissent from the majority decision. With respect, I am of the view that this appeal should be allowed with costs ('dissenting opinion').

[34] This judgment ('dissenting judgment') provides the reasons for my dissenting opinion.

B. BACKGROUND

[35] The defendant ('defendant') is a dental practitioner who has:

(1) graduated with a Bachelor's Degree in Dental Surgery from Mangalore University, India in 1986; and

(2) practised as a dentist since December 1987.

[36] On 11 December 2018:

(1) the plaintiff ('plaintiff'), 78 years old, went to the defendant's dental clinic, 'Klinik Pergigian Legenda' ('clinic'), at a building, No 14, Mezzanine Floor, Jalan Dato' Lee Fong Yee ('building') with her daughter, Madam Ravinder Kaur d/o Jaginder Singh (PW2), to seek treatment from the defendant for her toothache;

(2) the defendant undertook an intraoral examination of the plaintiff and advised the plaintiff to extract one of her molars. This advice was accepted by the plaintiff;

(3) the defendant injected a local anaesthetic known as lignocaine into the plaintiff's gums, near the tooth to be extracted. The defendant also gave antibiotic tablets (amoxicillin and flagyl) and paracetamol tablets for the plaintiff to swallow;

(4) after the plaintiff had swallowed the tablets, she suffered breathing difficulties;

(5) as to what had happened after the plaintiff experienced breathing difficulties, there was a conflict between:

(a) the testimony of PW2 ('PW2's testimony') and

(b) the oral evidence of the defendant and Puan Fazilah bt Mohd Ali, the defendant's assistant at the clinic ('DW2'). This dissenting judgment shall refer to the testimonies of the defendant and DW2 collectively as 'testimonies (defendant and DW2)'.

PW2's testimony and testimonies (defendant and DW2) will be alluded to in paras 8, 9 and 10 below;

(6) the plaintiff and PW2 were brought to Hospital Tuanku Ja'afar, Seremban ('hospital'), in a car driven by Mr Murugan a/l Govindasamy ('PW1'). At the material time, PW1 took his daughter to seek dental treatment at the clinic;

(7) the defendant went to the hospital in his own car;

(8) Dr Surenthiran s/o Ramanathan ('PW7') was on duty when the plaintiff was brought to the hospital. According to the hospital's medical records which had been adduced by PW7:

(a) the plaintiff had an anaphylactic shock at the clinic; and

(b) the plaintiff suffered a cardiac arrest when she arrived in the 'Accident and Emergency' Department of the hospital (A&E Department) but was revived by the medical personnel in the A&E Department;

(9) the plaintiff is now suffering from hypoxic-ischemic encephalopathy, a kind of brain damage. The plaintiff remains in a vegetative state. This suit was brought against the defendant by the plaintiff's son as her litigation representative ('plaintiff's litigation representative').

C. PROCEEDINGS IN HC

C(1). Pleadings

[37] The plaintiff's litigation representative claimed that the plaintiff's present vegetative state was caused by the defendant's negligence. I reproduce below the relevant parts of the plaintiff's amended statement of claim ('ASOC'):

(1) para 8 — PW2 requested for an ambulance on seeing that the plaintiff's condition had worsened;

(2) para 11 — the plaintiff's claim against the defendant was for damages by reason of injuries suffered by the plaintiff and which were caused or materially contributed to by the 'negligence and breaches of contractual and statutory duties to exercise reasonable care, skill and diligence, and of other duties of good faith and candour and to act in the best interests of the plaintiff'; and

(3) particulars of 'negligence and breach of contractual, statutory and other duties' were pleaded as follows, among others:

(a) sub-para 11.1.16 ASOC — the defendant failed to have available equipment, appliances or any other facilities that were necessary to stabilise the plaintiff's condition or to resuscitate the plaintiff;

(b) sub-para 11.1.19 ASOC — the defendant failed to provide ventilatory support to the plaintiff;

(c) sub-para 11.1.21 ASOC — the defendant failed to provide advice and information to PW2;

(d) sub-para 11.1.24 ASOC — the defendant failed to recognise that transferring the plaintiff in an ambulance to the hospital would have allowed for better emergency management than in a car;

(e) sub-para 11.1.25 ASOC — the defendant failed to arrange for and supervise the transfer of the plaintiff to the hospital;

(f) sub-para 11.1.28 ASOC — the defendant failed to act in accordance with the defendant's statutory duties as provided under the Private Healthcare Facilities and Services Act 1998 ('the PHFSA') and Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 ('the PHFSR'); and

(g) sub-para 11.2 ASOC — the defendant failed to have in place a proper and effective system for managing emergencies or alternatively failed to follow it sufficiently or at all.

[38] The amended defence ('AD') denied any liability on the part of the defendant in this case. I find the particular pleadings in the AD to be relevant:

(1) sub-para 5.18 AD — after the plaintiff swallowed the tablets, she immediately started coughing. PW2 began tapping the plaintiff's back and said that the plaintiff had sinus problem. The plaintiff continued to cough and appeared to be in discomfort;

(2) sub-para 5.19 AD — the defendant suspected that water had entered into the plaintiff's lungs. Hence, the defendant performed Heimlich manoeuvre on the plaintiff ('defendant's performance (Heimlich manoeuvre)'). After the defendant's performance (Heimlich manoeuvre), the plaintiff said she was better and she was able to walk to a chair. '*However, as the defendant felt that the Plaintiff might have some other medical problem, he called the [Hospital] for an ambulance*' (Emphasis added.);

(3) sub-para 5.20 AD — while the defendant was calling for an ambulance, the plaintiff asked PW2 by gesture for an inhaler. PW2 looked into the plaintiff's bag and said it was not there. PW2 informed DW2 that the plaintiff was asking for her asthma pump. *The plaintiff and PW2 'then walked out of the treatment room into the waiting area and subsequently walked out of the [Clinic]'* (Emphasis added.);

(4) sub-para 5.21 AD — *as the defendant was still on the phone arranging for an ambulance, he 'directed [DW2] to assist the Plaintiff'* (Emphasis

added.). After dealing with the call, the defendant followed the plaintiff. A patient who was at the clinic volunteered to take the plaintiff to the hospital (it was actually PW1 (father of a patient at the clinic at the relevant time) who took the plaintiff and PW2 to the hospital). *The defendant assisted the plaintiff into the car and then followed in his own car to the hospital* (Emphasis added.); and

(5) sub-para 5.24 AD — after PW2 informed DW2 on 11 December 2018 that the plaintiff was looking for her asthma inhaler, *DW2 updated the plaintiff's treatment card (defendant's record (plaintiff)) to include the disease of asthma in the medical history section* (Emphasis added.).

C(2). Evidence adduced at trial

[39] According to PW2's testimony, among others:

(1) after the plaintiff had swallowed the tablets given by the defendant on 11 December 2018, she suffered breathing difficulties. PW2 immediately got off the stool she was sitting on and rushed to the plaintiff (who was sitting on the dental patient's chair). PW2 started to tap the plaintiff on the back and front;

(2) PW2 called the plaintiff by her name and asked her what had happened. The plaintiff could not communicate verbally but gestured to PW2 that she could not breathe;

(3) the defendant started to hit the plaintiff on the back. The defendant then attempted to perform a Heimlich manoeuvre on the plaintiff. PW2 shouted to the defendant to call for an ambulance;

(4) the plaintiff gestured to the defendant to stop the defendant's performance (Heimlich manoeuvre). After the defendant's performance (Heimlich manoeuvre) ceased, PW2 assisted the plaintiff to the stool that PW2 was previously sitting on. PW2 then shouted for the defendant to seek help from medical doctors who operate near the clinic inside the building;

(5) PW2 subsequently shouted to the defendant to call for an ambulance. The defendant kept asking PW2 multiple times on whether he should call for an ambulance. PW2 insisted that the defendant should call for an ambulance and PW2 even used expletives due to the urgency of the situation;

(6) the defendant told PW2 that 'Okay, we drive her [Plaintiff] to the hospital'. The defendant and PW2 picked up the plaintiff by putting their arms under her shoulders and left the clinic. As they were leaving the clinic, PW2 screamed for help. A young Indian lady, Ms Hemalatha

(PW1's daughter) offered to take the plaintiff to the hospital. PW1 then asked if PW2 needed help and PW2 answered in the affirmative;

(7) PW1 and PW2 brought the plaintiff from the clinic at Mezzanine Floor of the building to the ground floor of the building ('ground floor') (through the stairs). The defendant was with PW1, PW2 and the plaintiff. While going down the stairs, the plaintiff became unconscious and her face turned blue;

(8) when PW1, PW2, plaintiff and defendant reached the ground floor, they put the plaintiff on a stool outside 'Samuel Klinik' ('medical clinic') (situated on the ground floor). PW1 drove his car to the ground floor. PW2 put the plaintiff in the back seat of PW2's car and was lying down on PW2. PW1 drove to the hospital and PW1's daughter was at the back seat with the plaintiff and PW2; and

(9) the defendant drove to the hospital in his own car.

[40] The defendant's evidence is as follows, among others:

(1) according to the defendant's witness statement ('WSD1'), among others:

(a) answer to question No 15, DWS ('A15 (WSD1)') stated as follows:

(i) after the plaintiff took the tablets on 11 December 2018, she started to have discomfort and started to cough. At that moment, PW2 started to tap the plaintiff on her back and informed the defendant that the plaintiff had a sinus problem;

(ii) the defendant asked the plaintiff to come down from the dental patient's chair. The defendant then performed the Heimlich manoeuvre on the plaintiff because he 'felt' that some water could have entered her wind pipe as she drank the water too fast;

(iii) after the defendant's performance (Heimlich manoeuvre), the defendant asked the plaintiff and she said she was better. The defendant then asked the plaintiff to sit on a chair (not the dental patient's chair) and she walked and sat on it; and

(iv) *the defendant 'felt' that the plaintiff might have some other medical problems. Hence, the defendant decided to call for an ambulance. The defendant informed the plaintiff and PW2 that he would be calling for an ambulance and instructed DW2 to be with the plaintiff* (Emphasis added.);

(b) answer to question No 16, DWS (A16 (WSD1)) — *while the defendant was on the phone, he noticed that the plaintiff was leaving the treatment room with PW2. The defendant instructed DW2 to accompany the plaintiff. The defendant was told that the ambulance would be late because all ambulances*

had gone out. Since the plaintiff was heading out of the clinic, the defendant did not have the opportunity to call for an ambulance from another hospital. The defendant ended the call and followed the plaintiff. The defendant caught up with the plaintiff and PW2 while the Plaintiff was 'partway' down the stairs (Emphasis added.);

(c) answer to question No 17, DWS (A17 (WSD1)) — *when the defendant caught up with the plaintiff and PW2, PW2 told the defendant that the plaintiff was 'tired' and found it difficult to walk. The defendant, PW2 and DW2 assisted the Plaintiff to go downstairs to the ground floor. At the ground floor, a chair was obtained from the medical clinic for the plaintiff to sit. The defendant went into the medical clinic to seek medical help for the plaintiff. However, the medical clinic could not help because the medical doctor was not in at that time* (Emphasis added.);

(d) answer to question No 18, DWS (A18 (WSD1)) — *after the defendant came out from the medical clinic, he said that he would send the plaintiff to the hospital in his car. PW1's daughter (one of the defendant's patients) said that PW1 was waiting in PW1's car and was willing to send the plaintiff to the hospital. PW2 agreed to the assistance by PW1. The defendant went to bring his car to the front of the building so that he could accompany PW1, plaintiff, PW2 and PW1's daughter to the hospital. The defendant got out from his car and helped the Plaintiff into PW1's car. The defendant then followed PW1's car* (Emphasis added.); and

(e) the defendant's car overtook PW1's car and reached the A&E Department first. The defendant told the A&E Department's personnel that there was a patient in a car who needed help. The A&E Department's personnel brought out a stretcher and took the plaintiff into the emergency room. The defendant told the doctors in the A&E Department regarding what had happened in the clinic;

(2) the defendant's record (plaintiff) was adduced as evidence in this case. I reproduced below the relevant portion of the defendant's pecord (plaintiff) which was written by the defendant himself on 11 December 2018:

> ... *After taking the medication patient suddenly has difficulty in breathing.* Then gave 1st aid. She was able to walk and sit on the chair. *Then we call the ambulance but the response was late. So we decided to take the patient to GH by car. Patient was able to walk half way down the stairs. Then she nearly collapsed. We manage to carry the patient down and took her to the GH. She was immediately attended to by the doctors and CPR was given. They were able to get her heart beat back. Then I came to clinic.* (Emphasis added.)

(3) after WSD1 was tendered by the defendant's then learned counsel, Ms Chrishanthini AR a/p Sebastiampillai ('SC'), SC proceeded to conduct an oral examination-in-chief ('oral EIC') of the defendant. According to the defendant's oral EIC in record of appeal (Part B), court encl No 5 ('encl 5'), at PDF pp 101–102

(printed pp 401–402), among others:

SC: *Now, for this last entry for 11.12.2018 [Defendant's Record (Plaintiff)], when did you write these notes*?

[Defendant]: *This one I wrote after I came back from the hospital*. (Emphasis added.)

(4) I reproduce below the relevant parts of the defendant's cross-examination by the plaintiff's learned counsel, Mr Manmohan Singh Dhillion ('MSD'):

(a) at PDF p 132 (printed p 432):

MSD: *Doctor, you offered to drive the patient to Seremban Hospital?*

[Defendant]: *Yes.* (Emphasis added.)

The above evidence was not re-examined by SC during the defendant's re-examination;

(b) at PDF p 141 (printed p 441):

MSD: *Now, look at page 92 [Defendant's Record (Plaintiff)], this is a retrospective record written after you came back from Seremban Hospital?*

[Defendant]: *Yes.* (Emphasis added.)

(c) at PDF p 163 (printed p 463):

MSD: *I take you to your medical records at Bundle B1, we look at the transcript at page 92 [Defendant's Record (Plaintiff)], first question, this medical record is the first written record of the event by you, correct?*

[Defendant]: *Yes.* (Emphasis added.)

[41] The contents of DW2's witness statement corroborated the defendant's evidence.

[42] The plaintiff had called Professor Dr Rashidi bin Ahmad ('PW5') to give an expert opinion regarding, among others, the standard of care expected of a practising dentist. The defendant had called Dr Kathiravan s/o Perumal ('DW3') to give expert testimony in respect of a practising dentist's duties of care when a dental patient (such as the plaintiff) experienced breathing difficulties ('medical emergency'). In the event of a medical emergency, both PW5 and DW3 agreed as follows:

(1) the defendant's clinic assistant, namely, DW2, should have been trained to call for an ambulance;

(2) the defendant's focus should have been on attending to the plaintiff;

(3) there were benefits in calling '999' call centre instead of calling directly the hospital for an ambulance;

(4) the plaintiff did not have any mechanical obstruction of her airway;

(5) the Heimlich manoeuvre would be of no assistance if there was no mechanical obstruction of the plaintiff's airway;

(6) the defendant should have undertaken a proper examination of the plaintiff so as to establish the cause of her breathing difficulties;

(7) the defendant had a duty to take charge and impress upon PW2 the importance of staying in the clinic while waiting for an ambulance;

(8) if PW2 had refused to follow the defendant's advice to stay in the clinic while waiting for an ambulance, this fact should have been recorded in the defendant's record (plaintiff);

(9) had the plaintiff remained in the clinic, the defendant would have been able to attend to her; and

(10) the defendant should have travelled in PW1's car so that he could attend to the plaintiff,

('experts' agreement (PW5 and DW3)').

C(3). HC's Decision

[43] The learned HC judge dismissed this suit with costs of RM50,000 ('HC's decision'). According to the HC's grounds of judgment ('GOJ'), among others:

(1) at paras 18–21 GOJ, the learned HC judge made a finding of fact that His Lordship accepted the testimonies (defendant and DW2) in preference to PW2's testimony ('HC's first factual finding'). According to the HC's first factual finding, PW2 had made the decision to leave the clinic with the plaintiff before the defendant was able to call for an ambulance;

(2) in view of the HC's first factual finding:

(a) as PW2 had led the plaintiff out of the clinic when the defendant was on the telephone, the learned HC judge arrived at a finding of fact that the defendant did not have any opportunity to make further examination of the plaintiff's condition so as to ascertain the cause of the Plaintiff's breathing difficulties ('HC's second factual finding') — para 45 GOJ;

(b) in paras 46–48 GOJ, the learned HC judge decided as a matter of fact that as PW2 had left the treatment room in the clinic at a time when the defendant was not present, 'it would no longer be open to

the [Plaintiff] to say that there had been a failure by the [Defendant] to either take charge of the situation or to advise [PW2]' ('HC's third factual finding'); and

(c) the HC decided in para 51 GOJ that if PW2 had not made the 'fateful decision' to leave the clinic and to accept the assistance of PW1, ie., if the plaintiff had remained at the clinic, the plaintiff could have been stabilised and there would have been better opportunity for CPR to be performed or an Ambu bag to be used to provide rescue ventilation while awaiting an available ambulance. Consequently, the defendant did not breach his duty of care by not having travelled in PW1's car together with the plaintiff ('HC's fourth factual finding');

(3) with regard to the submission by the plaintiff that the defendant ought to have made available in the clinic essential life saving equipment and ought to have implemented a well-defined care system to provide emergency care services under s 38 of the PHFSA and PHFSR, the learned HC judge decided as follows in paras 57–58 GOJ ('HC's decision (PHFSA and PHFSR)'):

> [57] *The defence exhibited at trial the minutes of a meeting between the Malaysian Private Dental Practitioners' Association (MPDPA) with the Principal Director of Dental Services from the Ministry of Health (MOH) (Meeting Minutes (MPDPA-MOH)). The [Meeting Minutes (MPDPA-MOH)) recorded that the MPDPA was informed by (MOH) that emergency drugs and oxygen tanks would only be required if a dental clinic was performing procedures that required sedation. For all other dental clinics, only an Ambu bag was necessary.*
>
> [58] *As a consequence, the emergency procedures that the [Defendant] ought to be capable of carrying out is calling for emergency assistance and to perform emergency ventilation and resuscitation. The [Defendant] did call for an ambulance. The need to perform CPR did not arise because — on the facts — I found that the [Plaintiff] had not collapsed or lost consciousness when she was in the [Clinic] or when she was on the [Ground Floor] before she was taken to the [Hospital].* (Emphasis added.)

[44] The learned HC judge did not decide that on the assumption that the defendant was liable in negligence to the plaintiff, the quantum of damages which should be awarded in favour of the plaintiff against the defendant ('quantum issue').

[45] The plaintiff's litigation representative has lodged an appeal to this court against the HC's decision ('this appeal').

D. ISSUES

[46] For reasons which will be expressed later, I will decide the following questions in this order:

(1) whether the HC's decision (PHFSA and PHFSR) constituted an error of law when the Meeting Minutes (MPDPA-KKM) have no force of law and cannot override the mandatory legal effect of the following statutory provisions:

(a) s 38(1) of the PHFSA;

(b) reg 75(3) of the PHFSR; and

(c) reg 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and (d) of the Fifth Schedule to PHFSR ('Fifth Schedule').

(2) I am not able to find any previous Malaysian case which has decided on the above issue;

(3) whether the HC's first factual finding, HC's second factual finding, HC's third factual finding and HC's fourth factual finding (collectively referred to in this dissenting judgment as 'HC's four factual findings') were 'plain' errors of fact which could not reasonably explained and which no reasonable trial judge could have reached when:

(a) there were material contradictions between the testimonies (defendant and DW2) and the contents of the defendant's record (plaintiff) (which were written by the defendant himself after his return from the hospital on 11 December 2018);

(b) the defendant had admitted during cross-examination that he had offered to drive the plaintiff to the hospital on 11 December 2018 ('defendant's admission') — please refer to the above sub-para 9(4)(a); and

(c) the testimonies (defendant and DW2) were inconsistent with sub-para 5.21 AD.

(4) whether:

(a) there exists a rule of law that the omission of the plaintiff's learned counsel to put to the defendant during his cross-examination that his evidence was contrary to the contents of the defendant's record (plaintiff) ('plaintiff's omission (defendant's cross-examination)') had the following legal consequences:

(i) the plaintiff had accepted the truth of the defendant's evidence that PW2 had left the clinic with the plaintiff on their own volition ('defendant's version');

(ii) the plaintiff had abandoned part of her pleaded case which denied the defendant's version; and

(iii) the plaintiff was barred from raising any argument to rebut the defendant's version; or

(b) notwithstanding the plaintiff's omission (defendant's cross-examination, the court:

(c) is duty bound to assess the defendant's version; and

(d) may accept or reject, totally or partly, the defendant's version; and

(5) notwithstanding the HC's decision, in the interest of a final, expeditious and economical disposal of this case, should the learned HC judge have decided on the quantum issue in the alternative?

E. DID HC'S DECISION (PHFSA AND PHFSR) CONSTITUTE AN ERROR OF LAW?

E(1). Effect of s 38(1) of the PHFSA, regs 75(3), 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and (d) Fifth Schedule

[47] I reproduce below the relevant parts of ss 38, 107 of the PHFSA, regs 75(3), 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and (d) Fifth Schedule ('statutory provisions'):

PHFSA:

s 38 *Emergency Treatment And Services*

(1) *Every licensed and registered private healthcare facility or service shall at all times be capable of instituting, and making available, essential life saving measures and implementing emergency procedures on any person requiring such treatment or services.*

(2) *The nature and scope of such emergency measures, procedures and services shall be prescribed.*

s 107 *Power to make regulations*

(1) *The Minister may make such regulations as appears to him necessary or expedient for carrying out the provisions of this Act.*

(2) *Without prejudice to the generality of the powers conferred by subsection (1) regulations may be made for all or any of the following purposes*:

...

(j) *to prescribe the minimum standards of the apparatus, appliance, equipment,*

instruments, substance and other things to be provided and maintained by private healthcare facilities or services ...

PHFSR

reg 75 Basic Emergency Care Services

...

(3) *All* private medical clinics or *private dental clinics shall provide immediate emergency care services which include life-saving procedures when life*, organ or limb *is in jeopardy* and management of emergency psychiatric conditions.

...

(8) *Equipment and services shall be provided to render emergency resuscitative and life-support procedures pending transfer of the critically ill* or injured *to other healthcare facilities* or services.

(9) *For the purpose of subregulation (8), the minimum capability provided, unless specified otherwise, shall include equipment, apparatus, materials, pharmaceuticals, substances or any other things deemed necessary to stabilise or resuscitate a patient as listed in the Fifth Schedule*

Fifth Schedule

Basic Emergency Services, Equipment, Apparatus, Materials And Pharmaceuticals

...

2. *Private Dental Clinic*

Each private dental clinic shall unless otherwise specified by standards set for that private dental clinic, provide at a minimum the following services and equipment, both adult and paediatric, to provide emergency care:

(a) *an emergency call system*;

(b) *ventilation assistance equipment*;

...

(d) *drugs and other emergency medical equipment and supplies, necessary for the level of services to stabilize the patient as specified by the person in charge*.

(Emphasis added.).

[48] In my view, the statutory provisions have mandatory legal effect because:

(1) the imperative term 'shall' is used in all the statutory provisions;

(2) ss 38(2), 107(1) and (2)(j) of the PHFSA provide that the 'Minister' (defined in s 2 of the PHFSA as the Minister charged with the responsibility for health) may 'prescribe the minimum standards of the apparatus, appliance, equipment, instruments, substance and other things to be provided and maintained by private healthcare facilities'.

Consequently, the Minister prescribed, among others, regs 75(3), 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and (d) Fifth Schedule. The employment of the term 'minimum' in s 107(2)(j) of the PHFSA clearly connotes the intention for regs 75(3), 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and (d) Fifth Schedule to have binding effect on a 'private healthcare facility' (which is defined widely in s 2 of the PHFSA to include a dental clinic);

(3) if otherwise:

(a) Parliament's intention in legislating ss 38(2), 107(1) and (2)(j) of the PHFSA will be in vain; and

(b) the contents of regs 75(3), 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and (d) Fifth Schedule will be reduced to a dead letter.

[49] The imperative nature of the statutory provisions can only be revoked as follows:

(1) only Parliament can repeal ss 38(2), 107(1) and (2)(j) of the PHFSA; and

(2) regs 75(3), 75(8) and (9) of the PHFSR read with sub-paras 2(a), (b) and(d) Fifth Schedule can only be revoked by the Minister.

[50] With respect, the HC's decision (PHFSA and PHFSR) constitutes an error of law ('HC's legal error'). My reasons are as follows:

(1) the learned HC judge did not refer to, let alone give effect to, the mandatory statutory provisions — please refer to the above para 17;

(2) the learned HC judge gave effect to the Meeting Minutes (MPDPA-KKM) which have no force of law; and

(3) as explained in the above para 18, the Meeting Minutes (MPDPA-KKM) cannot repeal or override in any manner the imperative nature of the statutory provisions.

[51] The mandatory effect of statutory provisions is as follows:

(1) s 38(1) of the PHFSA provides that every private healthcare facility, including a dental clinic 'shall at all times be capable of ... making available, essential life saving measures and implementing emergency procedures on any person requiring such treatment or services' ('duty (s 38(1) of the PHFSA)');

(2) according to reg 75(3) of the PHFSR, all private healthcare facilities 'shall provide immediate emergency care services which include life-saving procedures when life, ... is in jeopardy' ('duty (reg 75(1) of the PHFSR)'); and

(3) reg 75(8) of the PHFSR states that equipment and services in private healthcare facilities 'shall be provided to render emergency resuscitative and life-support procedures pending transfer of the critically ill or injured to other healthcare facilities or services'. Regulation 75(9) of the PHFSR provides that for the purpose of reg 75(8) of the PHFSR, the 'minimum capability provided, unless specified otherwise, shall include equipment, apparatus, materials, pharmaceuticals, substances or any other things deemed necessary to stabilize or resuscitate a patient as listed in the Fifth Schedule'. Sub-paragraphs 2(a)–(d) of the Fifth Schedule require each private dental clinic to 'provide at a minimum' certain services andequipment to provide emergency care ('duty (basic emergency services, equipment, apparatus, materials and pharmaceuticals)).

[52] It is not disputed in this case that for the purpose of deciding whether the defendant is liable for the tort of negligence to the plaintiff, the defendant owes a duty of care to the plaintiff ('defendant's duty of care (plaintiff)'). The defendant's duty of care (plaintiff), in my view, includes the duty (s 38(1) of the PHFSA), duty (reg 75(1) of the PHFSR) and duty (basic emergency services, equipment, apparatus, materials and pharmaceuticals) (referred collectively in this dissenting judgment as the 'three duties (PHFSA and PHFSR)'). If the defendant's duty of care (plaintiff) does not include the three duties (PHFSA and PHFSR), this will render nugatory the mandatory effect of the statutory provisions. In *Azman bin Karim & Anor v Hasa Arkitek Sdn Bhd & Ors* [2023] MLJU 2190, at [42], the HC has included in the duty of care owed by architects to their clients, the duties imposed by, among others, rr 28(1) and 29(1)(b) of the Architects Rules 1996.

E(2). Does HC's legal error warrant appellate intervention?

[53] Firstly, the defendant had breached the three duties (PHFSA and PHFSR) in this case ('defendant's breaches (three duties (PHFSA and PHFSR))').

[54] The question that arises is whether the defendant's breaches (three duties (PHFSA and PHFSR)) were a 'material contributing cause' of the plaintiff's present medical condition. In the Federal Court case of *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1, at [36], Richard Malanjum CJ (Sabah and Sarawak) (as he then was) has explained the application of the 'material

contributing cause' test as follows:

> [36] *In the light to these authorities, we are of the view that the 'but for' test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstance when there are two or more acts or events or factors that could or contribute to the injury of the plaintiff. This instant case is a case in point where evidence is established that there are a multiple of factors that could bring about the injury to the plaintiff. And to decide whether there is causation in these circumstances the approach of Lord Reid in Bonnington Casting Ltd v Wardlaw: whether any of these acts or events or factors has materially contributed to the plaintiff's injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material. As Lord Reid in the same case expounded: 'contribution which comes within the exception of de minimis non curat lex (the law does not concerns itself with trifles) is not material'.* (Emphasis added.)

[55] I am of the view that the defendant's breaches (three duties (PHFSA and PHFSR)) were a material contributing cause of the plaintiff's present vegetative state. This is because if the defendant had complied with the three duties (PHFSA and PHFSR), when the medical emergency first arose in the clinic, the defendant could have treated the plaintiff in the clinic itself without the need:

(1) for the defendant to call for an ambulance;

(2) for the defendant to seek medical assistance from the medical clinic; and

(3) for the plaintiff to be sent to the hospital, either in an ambulance or PW1's car.

It is clear that the tragedy that befell the plaintiff could have been easily avoided by the defendant's implementation of the three duties (PHFSA and PHFSR). This is why I proceed to resolve first the validity of the HC's decision (PHFSA and PHFSR).

[56] In view of the fact that the defendant's breaches (three duties (PHFSA and PHFSR)) were a material contributing cause of the plaintiff's present medical condition (please refer to the above para 55), on this ground alone I am constrained to allow this appeal with costs.

F. DID HC'S FOUR FACTUAL FINDINGS CONSTITUTE 'PLAIN' ERRORS OF FACT?

[57] It is trite law that in view of the audio-visual advantage enjoyed by a trial judge, an appellate court should not set aside the trial judge's findings of fact, especially regarding the credibility of witnesses — please refer to the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) &*

Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, at [33] and [34]. Exceptionally, as explained in *Ng Hoo Kui*, at [78], an appellate panel should only set aside a trial court's factual finding in the following circumstances:

> [78] *Hence following this court's ruling in Tengku Dato' Ibrahim Petra bin Tengku Indra Petra an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.* (Emphasis added.)

[58] Premised on *Ng Hoo Kui*, the issue is whether the HC's four factual findings are 'plain' factual errors in the following exceptional sense:

(1) the HC's four factual findings cannot be reasonably explained or justified; *and*

(2) no reasonable trial judge could have arrived at the HC's four factual findings.

[59] Respectfully, I am of the view that the HC's four factual findings constitute 'plain' errors of fact ('HC's plain factual errors') because:

(1) the HC's four factual findings cannot be reasonably explained or justified; *and*

(2) no reasonable trial judge could have made the HC's four factual findings;

(3) the following evidence and reasons support the above decision:

(a) the learned HC judge did not consider at all the defendant's record (plaintiff) in the GOJ;

(b) the contents of the defendant's record (plaintiff) should be given great weight because:

(i) the defendant's record (plaintiff) was written by the defendant himself after his return from the hospital on 11 December 2018. In other words, the defendant's record (plaintiff) was the defendant's own contemporaneous record of what had happened on 11 December 2018;

(ii) the defendant's record (plaintiff) was the only contemporaneous record in this case; and

(iii) up to 11 December 2018, the defendant had been practising as a

dentist for more than 31 years (from December 1987 when the defendant first started his dental practice). As a senior dental practitioner, the defendant should have realised the importance of the defendant's record (plaintiff). The defendant could not claim ignorance of the contents of the defendant's record (plaintiff) when sub-para 5.24 AD pleaded that DW2 updated the defendant's record (plaintiff);

(c) the contents of the defendant's record (plaintiff):

(i) supported PW2's testimony in material particulars; and

(ii) contradicted in material aspects the testimonies (defendant and DW2);

(d) when there is a conflict between a witness' self-serving oral evidence and the witness' own contemporaneous record, any reasonable trial judge would have accepted the latter — please refer to the judgment of Chang Min Tat FJ in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234;

(e) any reasonable trial judge would have been cautious, if not apprehensive, regarding oral testimonies given by the defendant and DW2 at the trial in June 2021 (after a period of more than 2 1/2 years after 11 December 2018);

(f) the learned HC judge did not take into account the defendant's admission that he had offered to drive the plaintiff to the hospital on 11 December 2018 (given during the defendant's cross-examination) — please refer to the above sub-para 9(4)(a). Significantly, the defendant's learned counsel did not re-examine the defendant regarding the defendant's admission;

(g) the testimonies (defendant and DW2) were inconsistent with sub-para 5.21 AD which pleaded that, among others, on 11 January 2018, after the defendant had attempted to call for an ambulance, the defendant followed the plaintiff to the ground floor and assisted the plaintiff into PW1's car;

(h) as explained in the above Parts E(1) and E(2), any reasonable trial judge would have decided that the defendant's breaches (three duties (PHFSA and PHFSR)] had been committed in this case; and

(i) when the medical emergency arose, as per the experts' agreement (PW5 and DW3):

(j) the defendant should not have made the telephone call for an ambulance — please refer to A15 (WSD1). The defendant's focus should have been on the plaintiff and he should have undertaken a

proper examination of the plaintiff so as to establish the cause of her breathing difficulties;

(k) even if it was true that PW2 had decided unilaterally to take the plaintiff to the hospital, as the defendant was able to meet PW2 and the plaintiff at the ground floor (please see A16 (WSD1), A17 (WSD1) and A18 (WSD1)), the defendant had a duty to take charge and impress upon PW2 the importance of staying in the clinic while waiting for an ambulance;

(l) if PW2 had refused to follow the defendant's advice to stay in the clinic while waiting for an ambulance, such a fact should have been recorded by the defendant in the defendant's record (plaintiff). The fact that the defendant himself did not record in the defendant's record (plaintiff) that he had advised PW2 to stay in the clinic while waiting for an ambulance, could only mean that the defendant had failed to advise PW2 as such; and

(m) the defendant should have travelled in PW1's car so that he could attend to the plaintiff.

[60] Due to the HC's plain factual errors, this appeal is allowed with costs.

G. WHAT IS EFFECT OF THE PLAINTIFF'S OMISSION (THE DEFENDANT'S CROSS-EXAMINATION)?

[61] In the Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at 794–795; [1995] 3 CLJ 639 (*Aik Ming*), Gopal Sri Ram JCA (as he then was), has decided as follows:

> *It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.*
>
> *This rule as to cross-examination to which I have just adverted derives its name from the case in which it was expressed. It is the decision of the House of Lords in Browne v Dunn* (1893) 6 R 67 *where Lord Herschell LC stated the principle in this way* (at p 70):
>
> > Now, my Lords, *I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested*

indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. (Emphasis added.)

[62] With respect, I am of the view that if a cross-examiner (X) has not put a particular proposition of fact (factual proposition) to a witness (Y) during Y's cross-examination by X:

(1) there is no rule of law ('purported rule') which obliges the court to:

(a) accept the truth of Y's evidence with regard to the factual proposition ('Y's evidence (factual proposition)');

(b) decide that X has abandoned part of X's pleaded case which denied Y's evidence (factual proposition); and

(c) bar X from raising any submission to rebut Y's evidence (factual proposition);

(2) the court:

(a) is duty bound to assess Y's evidence (factual proposition) and

(b) may accept or reject, totally or partly, Y's evidence (factual proposition).

[63] The above opinion is based on the following reasons:

(1) Chapter X (ss 135 to 166) of the Evidence Act 1950 ('the EA') has provided for 'Examination of Witnesses'. The purported rule is not provided in Chapter X of the EA, either expressly or by necessary implication. In fact, s 165 of the EA states as follows:

s 165 *Judge's power to put questions or order production*

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that —

(i) *the judgment must be based upon facts declared by this Act to be relevant and duly proved*;

(ii) *this section shall not authorize any Judge to compel any witness to answer any*

> *question or to produce any document which the witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse party nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149 nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted.* (Emphasis added.)

If the purported rule exists, this will render redundant the court's power under s 165 of the EA to ask any witness a 'relevant' question ('relevant' as understood in s 5 read with ss 6–55 of the EA — please refer to proviso (i) to s 165 of the EA);

(3) in the Federal Court case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) has delivered the following judgment:

> *Mr Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the* Supreme Court of *New Zealand in Transport Ministry v Garry* [1973] 1 NZLR 120*, 122 where Haslam J said at p 122*:
>
> > In *Phipson on Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz, where
> >
> > ... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all. (Emphasis added.)

It has been clearly decided in *Wong Swee Chin* that 'A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony';

(3) I am not inclined to follow *Aik Ming* because the Court of Appeal's decision in *Aik Ming* has been reversed by the Federal Court in a judgment delivered by

Edgar Joseph Jr FCJ in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465. Furthermore, the Court of Appeal in *Aik Ming* did not refer to, let alone discuss, the Federal Court's judgment in *Wong Swee Chin*;

(4) the purported rule has not been recognised in Singapore. I cite the following judgment of Yong Pung How CJ in the Court of Appeal of Singapore in *Liza bte Ismail v Public Prosecutor* [1997] 2 SLR 454, at [67], [68] and [72]:

> [67] The rule in *Browne v Dunn* is not inflexible. This was noted in that case *itself by Lord Morris in particular (at p 79), who emphasised the need for caution against 'laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit'. Similar sentiments were expressed by Gleeson CJ in R v Birks* (1990) 19 NSWLR 677*, a decision of the New South Wales Court of Criminal Appeal. Having set out the observations of the House of Lords in Browne v Dunn Gleeson* CJ observed (at p 688):
>
> > *It is plain that their Lordships, whilst recognising and affirming a rule of practice in the terms in which they expressed themselves, also recognised the need for flexibility in its application. That need arises from the very nature of the subject matter which it concerns. The central purpose of the rule is to secure fairness in the conduct of adversary proceedings. That consideration provides the best guide, both to the practical requirements of the rule in a given case, and to the consequences which may properly flow from its non-observance, including the remedies that are available to deal with a problem so created.*
>
> [68] *It is settled law then that the rule in Browne v Dunn is a flexible rule of practice, intended to ensure procedural fairness in litigation. The mere failure to cross-examine does not necessarily mean that adverse inferences must be drawn against the 'defaulting' party as there may be other explanations for this failure: R v Birks; R v Manunta* (1989) 54 SASR 17.
>
> ...
>
> [72] *Although the general proposition is that testimony not subjected to contradiction in cross-examination may be treated as unchallenged and thus accepted by the opposing party, the court is still entitled to reject such testimony: Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 *per Samuels JA at p 507; see also Hunt J's observations at p 18 in Allied Pastoral Holdings. A careful evaluation of the totality of the evidence must still be undertaken to determine the cogency and weight of such testimony. In other words, it need not always follow that the whole of the appellant's testimony would have to be accepted by the court, nor that the conviction in respect of DAC 9796/96 would ineluctably be considered flawed*. (Emphasis added.)

(5) the Privy Council ('PC') has not adopted the purported rule. This is clear from the following joint judgment of Lord Neuberger and Lord Mance (on behalf of the PC) in *Chen v Ng (British Virgin Islands)* [2017] UKPC 27, at [51] to [55], an appeal to PC from the Court of Appeal (British Virgin Islands) ('*Chen*'s case'):

[51] *Mr Parker's argument is, as it was before the Court of Appeal, that if the two grounds cited by the Judge were to be relied on as reasons for disbelieving Mr Ng, they ought to have been put to Mr Ng in cross-examination. As neither ground was raised with him, runs the argument, it was unfair for the Judge to have relied on either of them as reasons for disbelieving Mr Ng; accordingly, it would be wrong to let the decision of the Judge stand. The Court of Appeal accepted this argument, and, albeit with some hesitation, the Board considers that they were right to do so*.

[52] *In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it*.

[53] *Mr Parker relies on a general rule, namely that 'it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted', as Lord Herschell LC put it in Browne v Dunn* (1893) 6 R 67*, 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in Markem Corpn v Zipher Ltd*.

[54] The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. *It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him*.

[55] *At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the*

relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds. (Emphasis added.)

(6) it is clear from *Chen*'s case that there is no purported rule because:

(a) in a trial, it may be 'disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case';

(b) there are cases where there is a 'significant reason' for the court to disbelieve a witness with regard to evidence which has not been put to the witness; and

(c) whether an appellate court should uphold a trial judge's decision to reject a witness' evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial in question, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him. The following considerations (non-exhaustive) are relevant:

(i) two conflicting principles are at play, namely the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other hand;

(ii) the importance of the relevant issue, both absolutely and in the context of the case at hand;

(iii) the closeness of the grounds which were not put to the witness to the points which were put to the witness;

(iv) the reasonableness of the grounds not put to the witness, including the amount of time available for cross-examination of the witness and the amount of material to be put to the witness;

(v) whether the ground (not put to the witness) had been raised or touched on in speeches to the court, witness statements or other relevant places; and

(vi) in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds (not put to the witness).

[64] Premised on the cases and reasons explained in the above para 63, this appellate court:

A (1) is not bound to accept the defendant's version merely because of the plaintiff's omission (the defendant's cross-examination); and

(2) can and should decide whether the learned HC judge has committed a *plain* factual error (as explained in *Ng Hoo Kui*) in:

B (a) accepting the testimonies (defendant and DW2); and

(b) rejecting PW2's testimony.

[65] Notwithstanding the plaintiff's omission (the defendant's C cross-examination), I am of the view that the learned HC judge should not have accepted the testimonies (the defendant and DW2) and rejected PW2's testimony because:

(1) on 11 December 2018, the defendant had more than 31 years of experience as a dental practitioner. The importance of the defendant's D record (plaintiff) could not have been lost to the defendant;

(2) the contents of the defendant's record (plaintiff) had been filled in by the defendant himself after his return to the clinic from the hospital on 11 December 2018 and constituted the only contemporaneous record of E what had happened on that fateful day;

(3) sub-para 5.24 AD had expressly pleaded that the defendant's record (plaintiff) was updated by DW2. It is therefore clear that the defendant intended to rely on the defendant's record (plaintiff) to resist this suit;

F (4) the defendant's oral EIC had expressly referred to the contents of the defendant's record (plaintiff);

(5) the contents of the defendant's record (plaintiff) were corroborated by the defendant's admission;

G (6) during the defendant's cross-examination, the plaintiff's learned counsel did refer the defendant to certain parts of the defendant's record (plaintiff);

(7) if the plaintiff's learned counsel had put the contents of the defendant's H record (plaintiff) to the defendant during his cross-examination, in view of the reasons stated in the above sub-paras (1), (2) and (5) ('significant reasons'), I cannot envisage or foresee any reasonable explanation by him which could support his credibility in any manner. The significant reasons are sufficient for me to reject the defendant's version — please I refer to *Chen*'s case, at [52]; and

(8) there is no injustice to the defendant due to the plaintiff's omission (defendant's cross-examination). Nor had the defendant been deprived of a fair trial by reason of the plaintiff's omission (defendant's cross-examination).

[66] In view of the reasons explained in the above para 34, the plaintiff's omission (defendant's cross-examination) cannot bar this court from relying on the defendant's record (plaintiff) as a ground to allow this appeal with costs.

H. QUANTUM ISSUE SHOULD HAVE BEEN DECIDED BY HC

[67] It is trite law that in a personal injury claim, even though a trial court may have dismissed the claim, the trial court should decide on the quantum of damages which should have been awarded in favour of the plaintiff against the defendant — please refer to the Federal Court's judgment delivered by Syed Othman FJ in *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 at p 185. Such a practice is clearly in the interest of a final, expeditious and economical disposal of personal injury claims.

[68] The plaintiff's learned counsel has informed the court that the plaintiff's medical condition has deteriorated. Hence, if this appeal is allowed, the plaintiff prays for this case to be remitted to the HC for assessment of damages. In view of this exceptional reason, I will not give my view on the quantum issue.

I. CONCLUSION

[69] Premised on the above evidence and reasons:

(1) I will allow this appeal with costs here and below;

(2) the HC's decision is set aside; and

(3) this case shall be remitted to the HC for assessment of damages to be conducted by another judge or judicial commissioner.

[70] In closing, it is hoped that all private healthcare facilities will comply with the three duties (PHFSA and PHFSR) which have mandatory legal effect.

Appeal dismissed.

Reported by Ahmad Ismail